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IN THE

Supreme Court of the United States

October Term, 1997

KUHMO TIRE COMPANY, LTD., *et al.*,
Petitioners,

v.

PATRICK CARMICHAEL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICI CURIAE OF THE WASHINGTON LEGAL FOUNDATION AND THE MANUFACTURERS ALLIANCE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amici will address the following question: Whether the Court's analysis of expert evidence under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), is explicitly limited to the analysis of scientific expert testimony?

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Hand, *Historical & Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV.
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BRIEF OF THE WASHINGTON LEGAL FOUNDATION AND THE MANUFACTURERS ALLIANCE AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICI CURIAE[1]

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in Washington, D.C., with supporters in all fifty states. WLF

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[1]Pursuant to Supreme Court Rule 37.6, amici hereby indicate that no counsel for a party in this case authored this amicus brief. No parties or entities, other than amicus Washington Legal Foundation, its supporters, or counsel, contributed financially to the preparation or submission of this brief. The brief is being filed with a blanket written consent of the parties for all amici which has been lodged with the Clerk.

regularly appears before federal and state courts promoting economic liberty, free enterprise principles, and a limited and accountable government. WLF's Legal Studies Division also publishes monographs and other publications on these topics.

In particular, WLF has devoted substantial resources over the years through litigation and publishing to promote civil justice reform, including tort reform. WLF appeared as an amicus curiae in *General Electric Co.* v. *Joiner*, __U.S.__, 118 S. Ct. 512 (1997) and *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and WLF's Legal Studies Division published a monograph on the impact of the *Daubert* decision. Charrow & Bernstein, *Scientific Evidence In The Courtroom: Admissibility And Statistical Significance After Daubert* (Washington Legal Fndn. 1994).

The Manufacturers Alliance is a non-profit research organization supported by more than 500 manufacturing companies from a broad range of industries. Its members range in size from relatively small, single-product manufacturers with annual sales revenues in the $30 million-$100 million range to very large, highly diversified manufacturers with annual sales revenues exceeding $1 billion. Its mission is to assist its members in improving productivity by stimulating investment in technology and by encouraging innovations, thereby enhancing its members' worldwide competitiveness.

Amici believe that they can bring a broader perspective on the issues presented in this case, which will assist the Court in deciding this case in such a way as to give clear guidance to courts reviewing admissibility decisions regarding all expert evidence.

STATEMENT OF THE CASE

Amici curiae are, in the interest of brevity, omitting any detailed statements of the facts of this case. Amici adopt by reference the statement of facts set forth in Petitioners'-Brief.

In brief, Respondents commenced an action against the Petitioners in the United States District Court for the Southern District of Alabama, claiming that a tire manufactured by Petitioner Kumho Tire Company, Ltd. ("Kumho") failed as a result of a defect, causing injuries to the Respondents. In support of their claim that the tire was defective, the Respondents offered the testimony of a mechanical engineering expert, Dennis Carlson. Without even having seen the tire, Carlson issued an opinion that the tire failed as a result of either a manufacturing defect or a design defect. Carlson, however, could not specifically identify the defect.

Upon completion of discovery, Petitioners filed motions to exclude Carlson's testimony and for summary judgment. The District Court, applying the gatekeeping principles enunciated by this Court in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) ("*Daubert*"), found Carlson's testimony too unreliable and speculative and, consequently, excluded his testimony. *Carmichael* v. *Samyang Tires, Inc.*, 923 F. Supp. 1514, 1519-22 (S.D. Ala. 1996). The District Court then granted the Petitioners' motion for summary judgment. *Id.* at 1523-24. Respondents subsequently moved for reconsideration. On June 5, 1996, the District Court granted the motion for rehearing and affirmed its previous decision with additional analysis, stating that it had applied the *Daubert* factors in a manner that "complied with both

the letter and spirit of *Daubert*." *Carmichael* v. *Samyang Tires, Inc.*, No. 93-0860-CB-S, Order at 4-5 (S.D. Ala. June 5, 1996). The District Court also stated that the factors identified in *Daubert* were appropriately used to "gauge the reliability of Carlson's methods."[2] *Id.* at 4.

The Respondents appealed the District Court's judgment to the United States Court of Appeals for the Eleventh Circuit. The Court of Appeals reversed. *Carmichael* v. *Samyang Tire, Inc.*, 131 F.3d 1433, 1436 (11th Cir. 1997). Reasoning that the Supreme Court's decision in *Daubert* was explicitly limited to scientific experts, the Court of Appeals analyzed the testimony of Respondents' expert to determine whether it was based on scientific or non-scientific principles. Finding that his testimony was based on personal experience and skill and not scientific principles, the Eleventh Circuit found that the District Court had erred by applying *Daubert* to the testimony of Respondents' tire expert. *Id.*

SUMMARY OF ARGUMENT

It is beyond debate that expert witnesses play an important role in litigation -- they help the fact-finding mission by assisting the trier of fact to understand complex evidence that otherwise may not be comprehensible to a lay person. Because expert testimony involves areas that are

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[2]The District Court also considered other factors outside of the four identified in *Daubert*, but ultimately applied the four *Daubert* criteria because it "found *Daubert* factors appropriate, analyzed them, and discerned no competing criteria sufficiently strong to outweigh them." *Carmichael* v. *Samyang Tires, Inc.*, No. 93-0860-CB-S, Order at 4 (S.D. Ala. June 5, 1996).

typically outside the realm of knowledge and experience of the lay person, however, there is a danger that lay jurors may not be able to fully comprehend and evaluate the expert testimony before them. Moreover, because lay jurors may have difficulty in understanding complex expert testimony, they may also give unwarranted deference to the accuracy of opinions of experts with impressive credentials. Thus, in this day of paid experts where there may be greater pressure to render opinions that tend to coincide more with the litigant-customer's legal position rather than the truth, an unchecked expert can become a dangerous roadblock to the jury's search for truth.

For these reasons, courts have historically recognized the importance of the trial court's gatekeeping role in ensuring the reliability of an expert's opinions before allowing a jury to hear them. The enactment of the Federal Rules of Evidence did not alter this fundamental gatekeeping role of the trial court. Indeed, Rule 702 of the Federal Rules of Evidence requires that, in order for expert testimony to be admissible, it must "assist the trier of fact." And, it is axiomatic that no expert opinion can assist the trier of fact unless the opinion is reliable.

Nor can any distinction justifiably be drawn between "scientific" expert testimony and other "non-scientific" expert testimony. All expert testimony, whether scientific, technical or otherwise, is deemed to be expert opinion because it requires a certain level of knowledge and understanding that is beyond the reach of the lay juror. Thus, the concerns associated with the lay juror's potential inability to adequately evaluate the reliability of an expert's opinions, and the arguable deference that lay jurors may give to such opinions, remain constant, whether the

proffered expert testimony is based on science, technical knowledge, or mere experience and training.

That the Court in *Daubert* discussed only the scientific opinions before it in that case does not in any way alter the express provisions of Rule 702 and the gatekeeping functions of the district court. Indeed, the Court in *Daubert* expressly confirmed the gatekeeping role of district courts. Moreover, the Court stated that it was interpreting and applying Rule 702 in connection with a scientific expert only because that was the case that was before it. The Court specifically noted, however, that Rule 702 applied to all expert evidence, not just novel scientific expert evidence. Consequently, the Eleventh Circuit erred when it found that *Daubert* applied only to scientific experts and reversed the District Court solely because it had applied the four criteria identified in *Daubert*. While the District Court was not required to consider only the four *Daubert* factors in evaluating the reliability of the testimony of Respondents' expert, its decision to do so was not in error.

In sum, because all expert testimony, whether scientific, technical or otherwise, shares a common denominator -- that they involve knowledge and understanding that are beyond the ordinary knowledge and experience of the lay jury -- which forms the foundation of the need for scrutiny, the trial court must act as a gatekeeper for all expert evidence, not just scientific evidence. Accordingly, the Eleventh Circuit, which found that non-scientific expert opinions should not be subject to the *Daubert* analysis, should be reversed.

ARGUMENT

I. BECAUSE OF THE POTENTIAL IMPACT EXPERT TESTIMONY CAN HAVE ON JURORS, TRIAL COURTS HAVE TRADITIONALLY SCRUTINIZED ALL EXPERT TESTIMONY TO ENSURE ITS RELIABILITY

A. By Its Very Nature And Purpose, Expert Testimony Has The Potential To Exert Undue Influence On Jurors

Expert witnesses undeniably play an important function in many lawsuits. They are the avenue by which the court and the finder of fact can be properly educated so that they can evaluate the evidence and decide the issues before them. Because of this important role expert witnesses play in litigation, they can become a powerful, adversarial tool for litigants. Indeed, studies have shown that litigants who utilized expert witnesses are often more successful in the outcome of the lawsuits. *See, e.g., Expert Witnesses Found Credible By Most Jurors*, NATL. L.J., Feb. 22, 1993, at S4, col. 1 ("jurors in both civil and criminal cases said the experts whose testimony they heard were both credible and influential in the outcome"); Cooper, Bennett & Sukel, *Complex Scientific Testimony: How Do Jurors Make Decisions?*, 20 LAW & HUMAN BEHAVIOR 379, 387 (1996) ("more mock jurors found for

the plaintiff when his case was presented with highly complex arguments by an expert with high credentials").[3]

Experts, however, by nature, testify about subject matters that are outside of the ordinary understanding and knowledge possessed by the lay juror. For that reason, the jurors may not possess the capability to test the expert opinions they hear against their own everyday experience and common sense. Moreover, because experts tend to possess impressive credentials, there is justifiable concern that jurors may extend unjustified deference to the experts' opinions. *See* 29 Wright & Gold, *Federal Practice & Procedure* § 6264, at 182-83 (1997); Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half Century Later*, 80 COLUM. L. REV. 1197, 1237 (1980) ("The major danger of scientific evidence is its potential to mislead the jury; an aura of scientific infallibility may shroud the evidence and thus lead the jury to accept it without critical scrutiny."); Tribe, *Trial By Mathematics: Precision and Ritual In The Legal Process*, 84 HARV. L. REV. 1329, 1334 (1971) ("[T]he very mystery that surrounds mathematical arguments -- the relative obscurity that makes them at once impenetrable by the layman and impressive to him -- creates a continuing risk that he will give such arguments a credence they may not deserve and a weight they cannot logically claim.").

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[3]*See also* Saks & Van Duizend, *The Use of Scientific Evidence In Litigation* 5-6 (1983) (citing results of O. Schroeder, *The Forensic Science In American Criminal Justice: A Legal Study Concerning The Forensic Sciences Personnel* (1977)) (over 70 percent of judges and attorneys surveyed believed that juries accorded expert scientific evidence more credibility than other evidence).

Thus, as the Ninth Circuit Court of Appeals noted in *United States* v. *Amaral*, 488 F.2d 1148, 1152 (9th Cir. 1973), because "[s]cientific or expert testimony" has an "aura of special reliability and trustworthiness", it could "create a substantial danger of undue prejudice or confusing the issues or of misleading the jury". This concern was also clearly articulated by Judge Jack Weinstein in *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1223, 1244 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987), where the court stated: "The jury will not be permitted to be misled by the glitter of an expert's accomplishments outside the courtroom."[4]

Adding to the concern that jurors may be unduly influenced by an expert's testimony is the fact that expert witnesses are typically paid witnesses. Indeed, testifying is a major source of income, if not livelihood, for many expert witnesses. As Professor Samuel R. Gross of the University of Michigan Law School explained:

> Because experts are paid to testify, and because they can be hired repeatedly to work on cases with similar or identical issues, they can become professional

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[4]As long ago as 1901, Judge Learned Hand raised concerns over the ability of lay fact finders to fully comprehend complex expert evidence. *See* Hand, *Historical & Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 54 (1901) ("The whole object of the expert is to tell the jury, not facts, as we have seen, but general truths derived from his specialized experience. But how can the jury judge between two statements each founded upon an experience confessedly foreign in kind to their own? It is just because they are incompetent for such a task that the expert is necessary at all.").

> witnesses. Many do just that -- they advertise their services . . . and earn substantial sums from this line of work.
>
> * * * *
>
> Experts whose incomes depend on testimony must learn to satisfy the consumers who buy that testimony; those who do not will not get hired. In some cases experts may distort their views to suit the interests of their clients, perhaps even lie outright . . . .

Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1131-32. *See also* Berger, *A Relevancy Approach To Novel Scientific Evidence*, 115 F.R.D. 89, 91 (1987) ("It is quite apparent that experts are readily available to present essentially frivolous theories . . . ."); Weinstein, *Improving Expert Testimony*, 20 U. RICH. L. REV. 473, 482 (1986) ("An expert can be found to testify to the truth of almost any factual theory, no matter how frivolous . . . .").

This concern was repeated by the Fifth Circuit Court of Appeals in *In re Air Crash Disaster at New Orleans, Louisiana*, 795 F.2d 1230, 1233 (5th Cir. 1986), where the court stated: "Our point is that the ultimate issue in such cases [products liability cases] can too easily become whatever an expert witness says it is, and trial courts must be wary lest the expert become nothing more than an advocate of policy before the jury." *See also Turpin* v. *Merrell Dow Pharmaceuticals, Inc.*, 959 F.2d 1349, 1352 (6th Cir. 1992) ("[C]lose judicial analysis of such technical and specialized matter is necessary not only because of the likelihood of juror misunderstanding, but also because expert witnesses are not necessarily always unbiased scientists.").

Thus, the role expert witnesses play in litigation can be profound. While their intended purpose is clearly to aid the trier of fact, for the reasons discussed, experts have the potential to stand in the way of helping the jury do its job if their testimony, whether scientific, technical or otherwise, is not reliable.[5]

B. *Daubert* Confirmed The Gatekeeping Role That Trial Courts Have Traditionally Played In Ensuring The Reliability Of All Expert Testimony

Against the backdrop of the potential impact expert witnesses can have in litigation, it is no surprise that courts and legal scholars long ago recognized the importance of screening all expert testimony to ensure that it is reliable. If proffered testimony is not reliable or its methodology is not sound, it is clear that the testimony will not assist the

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[5]Indeed, in *Daubert* the Court implicitly acknowledged the potential danger of expert testimony misleading jurors when it reminded trial courts that they should also be mindful of Fed. R. Evid. 403 when assessing the proffer of expert testimony. *Daubert*, 509 U.S. at 595 ("'Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses.'") (quoting Weinstein, *Rule 702 of the Federal Rules of Evidence Is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 638 (1991)).

jury.[6] Consequently, it has long been the role of trial courts to screen expert testimony to ensure it is reliable and will assist the trier of fact. For example, in *Stillwell & Bierce Mfg. Co.* v. *Phelps*, 130 U.S. 520, 527 (1889), the Court recognized that whether an expert offered "qualifications and knowledge" that could offer reliable help in a particular case was "a preliminary question for the judge presiding at trial." *See also Congress & Empire Spring Co.* v. *Edgar*, 99 U.S. 645, 658 (1879); *Chateaugay Ore & Iron Co.* v. *Blake*, 144 U.S. 476, 484 (1892).

The seminal case of *Frye* v. *United States*, 293 F. 1013 (D.C. Cir. 1923), similarly recognized the role that the trial court must play in screening expert evidence to insure that only reliable testimony is presented to the trier of facts. While the specific substantive standard that the *Frye* court established -- whether the expert's theory was "generally accepted" within the relevant scientific community -- was displaced by the enactment of the Federal Rules of Evidence (*Daubert*, 509 U.S. at 589), significantly, the Rules did not alter *Frye*'s threshold requirement that the trial court evaluate the expert's testimony to ensure its reliability before allowing it to go to the jury.

Indeed, the Court's decision in *Daubert* clearly articulated the gatekeeping role of the district court under

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[6]As Justice Thomas observed in *United States* v. *Scheffer*, ___ U.S. ___, 118 S. Ct. 1261, 1265 (1998), "the exclusion of unreliable evidence is a principal objective of many evidentiary rules." *See, e.g.*, Fed. R. Evid. 802; Fed. R. Evid. 901; Fed. R. Evid. 1002.

Fed. R. Evid. 702. "Nor is the trial judge disabled from screening [expert] evidence. To the contrary, under the Rules the trial judge *must insure* that any and all scientific testimony or evidence admitted is not only relevant, *but reliable*." *Daubert*, 509 U.S. at 589 (emphasis added). Thus, courts have regularly performed their roles as gatekeepers under Rule 702 to screen all types of expert testimony for reliability before allowing it to be presented to a jury. For example, in *In re Air Crash Disaster at New Orleans, Louisiana*, 795 F.2d 1230 (5th Cir. 1986), the court determined that the district court should have refused to accept the conclusions of plaintiffs' economist where the economist failed to provide a reasonable basis for his calculations. In reaching its decision, the court cautioned that:

> [T]rial courts must be wary lest the expert become nothing more than an advocate of policy before the jury. Stated more directly, the trial judge ought to insist that a proffered expert bring to the jury more than the lawyers can offer in argument. Indeed, the premise of receiving expert testimony is that it "will assist the trier of fact to understand the evidence or to determine a fact in issue...."

Id. at 1233 (quoting Fed. R. Evid. 702).

The court in *Renaud* v. *Martin Marietta Corp., Inc.*, 972 F.2d 304, 308 (10th Cir. 1992), provided similar direction to the district court. In affirming the district court's exclusion of plaintiff's expert testimony, the Tenth Circuit recognized that the district court fulfilled its

independent duty initially to determine the reliability of the proffered expert testimony of plaintiffs' environmental engineer and hydrologist in ruling on its admissibility. *See also Watkins* v. *Telsmith, Inc.*, 121 F.3d 984 (5th Cir. 1997) (design expert excluded because testimony unreliable); *Peitzmeier* v. *Hennessy Indus., Inc.*, 97 F.3d 293 (8th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 1552 (1997) (expert testimony concerning design of tire changing machine excluded as unreliable); *Cummins* v. *Lyle Indus.*, 93 F.3d 362 (7th Cir. 1996) (expert testimony regarding adequacy of warnings and feasibility of alternative designs excluded as unreliable because untested); *Peters* v. *Five Star Marine Service*, 898 F.2d 448, 449-450 (5th Cir. 1990) (affirming district court's decision excluding proposed testimony of maritime operations expert under Rule 702 where it would not assist trier of fact); *United States* v. *Downing*, 753 F.2d 1224, 1226 (3d Cir. 1985) (holding that district court must assess various factors in conducting "preliminary scrutiny" of proposed expert evidence on eyewitness identifications by psychologist); *United States* v. *Marabelles*, 724 F.2d 1374, 1381-82 (9th Cir. 1984) (court did not abuse its discretion in excluding unreliable expert testimony of loan officer that would not reasonably assist the jury); *Larsen* v. *International Bus. Mach. Corp.*, 87 F.R.D. 602, 606-607 (E.D. Pa. 1980) (holding that Rule 702 is a "codification of existing federal law" and requires the trial court to determine if proffered expert testimony of safety expert will assist trier of fact to understand the evidence).

Furthermore, there is nothing in the teachings of prior court decisions and the writings of legal scholars that can justify the elimination of a trial court's gatekeeping scrutiny of expert evidence depending on the type of expert testimony that is proffered by a party. Regardless of the

discipline involved, the purpose of an expert's testimony is to provide information to jurors in areas that are beyond the knowledge and experience of the lay juror. Consequently, the concerns of reliability arise so that the trier of fact is not misled by information it does not understand, or gives too much credence because of an expert's credentials. Thus, all types of expert testimony are the same for purposes of their demand for a trial court's gatekeeping scrutiny.[7] Indeed, Rule 702, on its face, unequivocally applies this gatekeeping requirement to all expert evidence, not just scientific evidence.

II. THE ELEVENTH CIRCUIT ERRED IN RULING THAT *DAUBERT'S* TEACHINGS ARE LIMITED TO THE EVALUATION OF SCIENTIFIC EVIDENCE

A. The Court's *Daubert* Analysis Applies To All Expert Evidence, Not Just Scientific Evidence

In articulating the trial court's role as a gatekeeper to scrutinize expert testimony for relevance and reliability, the Court in *Daubert* stated, "The primary locus of this obligation is Rule 702, which clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify." 509 U.S. at 589. Thus, the inquiry of what types of expert testimony ought to be subject to scrutiny under *Daubert* must begin with the

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[7] *See* Laser, *Inconsistent Gatekeeping in Federal Courts: Application of Daubert v. Merrell Dow Pharmaceuticals, Inc. to Nonscientific Expert Testimony*, 30 LOY. L.A. L. REV. 1379 (April 1997).

provisions of Rule 702. The Rule states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." It is beyond argument that no part of Rule 702 commands that scientific expert testimony be afforded different treatment from other types of expert testimony. The Rule simply lumps all experts together and requires that their opinions satisfy two conditions: (1) that they "assist the trier of fact" and (2) that they be "qualified as an expert."

The advisory committee notes to Rule 702 further support the clear wording of Rule 702 that the district court, in the first instance, must screen all expert evidence in accordance with the Federal Rules of Evidence. For instance, the advisory committee noted that "Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier." Fed. R. Evid. 702 Advisory Committee's Note. That this exercise by the district court is not limited to only scientific experts is made clear in the notes:

> The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical" but extend to all "specialized" knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training or education." Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians,

> physicists, and architects, but also the large group sometimes called "skilled" witnesses, such as bankers or landowners testifying to land values.

Id.

In determining that expert testimony must be scrutinized for its ability to assist the jury and for its reliability, the Court did not read nonexisting words into the statute to create a distinction obligating the trial court to scrutinize only scientific expert evidence, but not other types of expert evidence. The Court quite clearly explained that the only reason it confined its decision to scientific testimony was because that was the specific testimony in the case that was before the Court. "Rule 702 also applies to 'technical, or other specialized knowledge.' Our discussion is limited to the scientific context because that is the nature of the expertise offered here." 509 U.S. at 590 n.8. Indeed, the Court then went on to note that:

> Although the Frye decision itself focused exclusively on "novel" scientific techniques, we do not read the requirements of 702 to apply specifically or exclusively to unconventional evidence. Of course, well-established propositions are less likely to be challenged than those are novel, and they are more handily defended.

Id. at 593 n.11.

Against the undeniable premise that *Daubert*'s direction for the trial court to act as a gatekeeper to

determine the relevance and reliability of an expert's testimony finds its genesis in Rule 702, it would defy reason to suggest that the Court would have reached a different conclusion for non-scientific expert testimony, particularly where the rule itself does not distinguish between the two.

B. By Reading *Daubert* To Apply Only To Scientific Evidence, The Eleventh Circuit Misconstrued The Teachings of *Daubert*

Below, the Eleventh Circuit did not consider at all whether the four *Daubert* factors the District Court applied could have assisted the District Court in evaluating the reliability and relevance of the Respondents' expert's testimony. Instead, it summarily concluded that because Respondents' expert was not a "scientific" expert, the District Court should not have subjected his testimony to a *Daubert* analysis. As explained above, this was clear error because a trial court's *Daubert* gatekeeping requirements apply to *all* expert evidence, *not* just scientific evidence.

By holding that *Daubert* does not apply because the expert is not testifying about science, the Eleventh Circuit completely misconstrued the meaning of *Daubert*. In effect, the Eleventh Circuit reduced *Daubert* to the rather simple proposition that the four factors identified by the Court should be applied only to scientific expert testimony, and no other kind of expert testimony. Proceeding from that false premise, the Eleventh Circuit conclusory ruled that the District Court never should have reached the four *Daubert* factors because Respondents' expert testimony was non-scientific. *Daubert*'s teachings, however, are not that simple. The crux of *Daubert* was not the application of the four factors to the scientific

evidence at issue in *Daubert*. Rather, it was its charge to the district courts to act as "gatekeepers" to insure the "reliability" of all expert testimony submitted to the jury. This "gatekeeper" responsibility requires the trial court to make a threshold analysis of the expert's proffered testimony -- whether scientific, technical or otherwise -- to determine whether it constitutes "specialized knowledge"[8] that will "assist" the trier of fact to understand or determine a fact in issue." The Court emphasized that this gatekeeping analysis must, of necessity, be:

> [A] flexible one. Its overarching subject is the scientific validity and thus the evidentiary relevance and reliability -- of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.

509 U.S. at 594-95.

While the Court did set forth four general factors that courts could consider when evaluating an expert's proffered testimony, it specifically noted that *many* factors may bear on the inquiry. 509 U.S. at 593. And, the trial court is in the best position to determine what such criteria ought to be, based on the facts of the case before it. As

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[8]The Court emphasized in *Daubert* that the word knowledge "applies to *any* body of facts or to *any* body of ideas inferred from such facts or accepted truths on good grounds." *Id.* at 590 (quoting Webster's *Third New International Dictionary* 1252 (1986)) (emphasis added).

the Court stated in *Daubert*, "We are confident that federal judges possess the capacity to undertake this review." *Id.*

Thus, the District Court in this case did precisely what *Daubert* directed it to do. Performing its "gatekeeping" duties, the District Court evaluated the testimony proffered by Respondents' expert to determine whether the expert's testimony was reliable and would assist the jury. And while the District Court did use the four factors set forth in *Daubert* to perform its evaluation, it did not limit its inquiry to these four factors. Indeed, the Court specifically considered other factors; it found "the *Daubert* factors appropriate, analyzed them, and discerned no competing criteria sufficiently strong to outweigh them"; and, after doing so, the District Court found Respondents' expert's testimony unreliable and, thus, excluded it from evidence. *Carmichael* v. *Samyang Tires, Inc.*, No. 93-0860-CB-S, Order at 4 (S.D. Ala. June 5, 1996).

Accordingly, the District Court properly applied *Daubert* to Respondents' expert's testimony, and it was error for the Eleventh Circuit to reverse based on its characterization of the expert's opinions as being non-scientific.

CONCLUSION

The District Court below properly excluded the Respondents' expert's testimony. Accordingly, amici curiae respectfully request that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

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